Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES,
Appellant,

vs.

LEE YEN TAI,
Appellee.

No. 1002.

BRIEF FOR APPELLEE.

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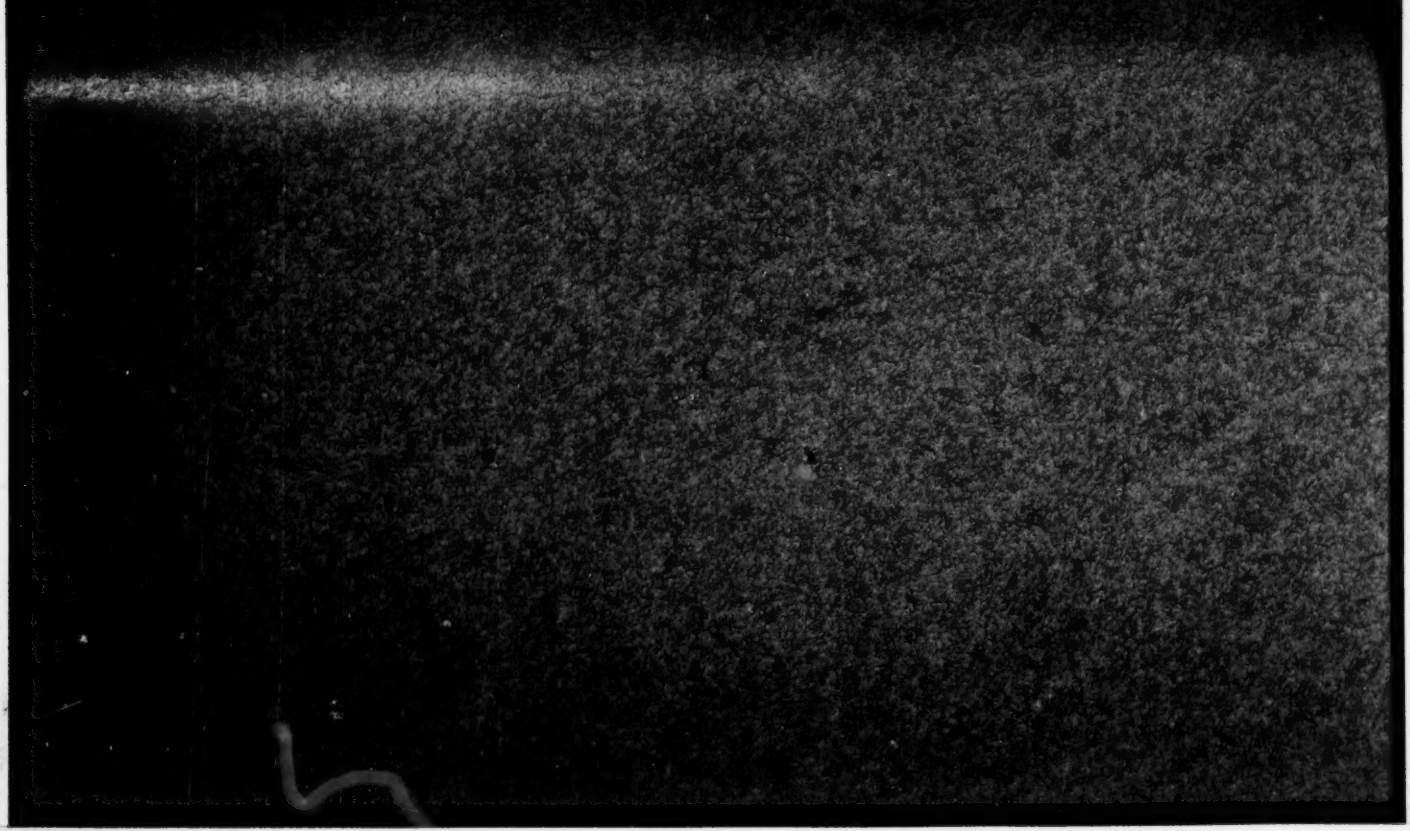

IN THE

Supreme Court of the United States.

THE UNITED STATES, Appellant, vs. LEE YEN TAI, Appellee.	No. 503.

Brief for Appellee.

This case is here upon a Certificate from the United States Circuit Court of Appeals for the Second Circuit of the question:

"Is Section 12 of "An Act to execute certain treaty stipulations relating to the Chinese, approved May 6th, 1882, as amended by the Amendatory Act of July 5, 1884, and continued in force by Section 1 of the act of May 5th, 1892, repealed by the Treaty or Convention with China of December 8th, 1894?"

The certificate of that Court, dated December 17th, 1901, was superseded by the amended certificate, dated December 20, 1901, which states the facts and the question certified more accurately (Record, fol. 7-9).

It appears from the certificate that on October 8th, 1900, defendant, Lee Yen Tai, alias Lee Gin Moy, was arrested within the United States upon a warrant issued by a United States Commissioner for the Northern District of New York, charging him with being a Chinese person and laborer who had unlawfully entered the United States without producing the certificate required of Chinese persons seeking to enter, and the commissioner found that he was a Chinese person and laborer who had entered unlawfully without said certificate and ordered his deportation to China. He claimed to be a Chinese merchant, but did not produce the certificate prescribed for Chinese persons of the privileged classes to establish his mercantile status (see United States vs. Mrs. Gue Lim, 176 U. S.,459, 467). Thereafter, while in the custody of the U. S. Marshal within the Southern District of New York for the purpose of deportation, a writ of habeas corpus issued out of the U. S. District Court for the Southern District of New York, upon a petition averring that he was a Chinese merchant, but was in custody under the above described order of deportation of a United States Commissioner, but that said order was null and void and made without jurisdiction, because the United States Commissioner had no jurisdiction of said cause by reason of the Treaty of the United States with China of December 8th, 1894. The warrant of deportation was returned in obedience to said writ, whereupon Judge Addison Brown sustained defendant's claim, and directed defendant's discharge.

The United States appealed to the Circuit Court of Appeals, which after argument decided various subsidiary points against the Government, but certified the question of the Commissioner's jurisdiction to this Court, as one involving the construction of said treaty with China.

Section 12 of the Act of 1882 (amended by Section 12 of the Act of 1884) was continued in force for a further period of ten years by the Act of 1892 known as the Geary Law; it is the procedure section under which Chinese persons found within the United States, charged to have entered the United States unlawfully, have been dealt with heretofore in judicial proceedings looking to their deportation.

The cause was advanced by consent and two other cases, involving this and other questions, brought here on the appeal of the Chinese defendants, were set down with it for argument as one cause (Nos. 525 and 526).

It is contended on behalf of the Chinese defendants that there is no existing authority for judicial proceedings for the deportation of Chinese persons alleged to have entered the United States unlawfully, because the procedure provision (Section 12 of the Act of 1884) was repealed by the treaty of 1894. It is not contended that exclusion by executive action of Chinese laborers is no longer authorized, but, on the contrary, the treaty of 1894 is in line with the general policy expressed in the Act of Aug. 18, 1894 (28 Stat., 390), passed after it was signed, leaving this subject matter wholly

to administrative action (Lem Moon Sing vs. U. S., 158 U. S., 538, and later appropriation acts considered in Williams vs. U. S., 168 U. S. 382, 388), and divesting the Courts of jurisdiction over these cases. Nor is it contended that the jurisdiction of U. S. Judges under Section 6 of the Act of 1892 as amended in 1893 (Fong Yue Ting vs. U. S., 149 U. S., 698), has been interfered with to order the deportation of Chinese laborers, who were such at the time of the passage of these acts, and neglected to register. That provision is expressly continued by the Treaty of 1894, does not concern itself with alleged unlawful entry, and is not involved in these cases.

POINT I.

The Treaty of 1894 (2 Sup. Rev. St. 155, 28 Stat. at L., p. 1210), should be construed as covering the whole ground of Chinese exclusion, and its failure to prescribe any judicial procedure for deportation in alleged unlawful entry cases and to continue any prior statute to that effect, renders the act of the U. S. Commissioner herein null, as made without jurisdiction.

The present cases present for the first time directly the question, what changes in regard to the treatment of Chinese persons were effected by the Convention with China of 1894, which concededly made some radical modifications of statutory pro-

visions. This Treaty was incidentally referred to in the case of United States vs. Mrs. Gue Lim, 176 U. S., 459, but there was no appearance in that case for the Chinese respondents, and nothing inconsistent with our contentions was said therein by this Court, as more clearly shown hereafter. China has, however, through diplomatic channels, made the claims herein urged. It is submitted that the Treaty of 1894 covers the whole subject of Chinese immigration to the United States, and repealed *ipso facto* all prior provisions not therein specifically recognized and continued in force, including Section 12 of the Act of 1884, upon which the Commissioner's jurisdiction rests.

From its very nature, the admission or exclusion of particular classes of aliens is an eminently proper subject for regulation by treaty, rather than by legislation, and it has been our national policy to so regulate the matter. Almost every treaty recognizes or confers the right of entry into the United States of alien subjects of the other contracting party, and similiarly it is there one would naturally expect to encounter restrictions of said right. In the case of Chinese immigrants the right of entry expressly conferred by the Treaty of 1868 (Fong Yue Ting vs. United States, 149 U. S., 698, 716), was first limited by the Treaty of 1880 (22 Stat. at L., p. 826), by which, subject to certain limitations, China specifically acceded to subsequent legislation by the United States limiting the entry of Chinese LABORERS. Accordingly, our first Chinese Exclusion Act, passed May 6, 1882 (22 Stat., 58, 1 Sup. R. S., p. 342), was

properly entitled "An act to *execute* certain treaty stipulations relating to China," and the Act of 1884 (23 Stat. at L., 1 Sup. R. S., p. 458), merely in terms amended certain provisions of this Act. That certain provisions of the Act might possibly be construed as inconsistent with the treaty stipulations was recognized, and the courts construed the Statutes as far as possible to make them consistent with the treaty (Chew Heong vs. U. S., 112 U. S., 536, U. S. vs. Mrs. Gue Lim, 176 U. S., 459, 465), being compelled to recognize, however, that both have equal force. and that a later Statute will repeal a prior treaty, where the purpose so to do is clear. Conditions in the United States arising from this Chinese labor immigration seemed to call for more stringent measures, and a new treaty with China was negotiated in 1888, covering the ground of all prior Statutes and Treaties (Foreign Relations, 1888, I, 393) but China eventually rejected this treaty, though in the interim Congress had passed the Act of September 13th, 1888 (25 Stat. 476, 2 Sup. R. S., p. 141) to go into effect with respect to its clauses as to Chinese subjects' admission, upon the ratification of that treaty, which latter statute not only covered the ground of the prior statutes and was an implied substitute therefor, but expressly repealed the Acts of 1882 and 1884 (Sec. 15) upon the ratification of said treaty. That treaty was never ratified (Li Sing vs. U. S., 180 U. S., 486, 488). It was only when efforts to deal with this matter by means .of treaties failed, that independent statutes were passed, first the Act of October 1, 1888, then the Acts of

1892 and 1893. In his approval of the Act of Oct. 1, 1888, the President referred to the failure of these negotiations by China's rejection of the treaty, and that this made it his duty "to join the Congress in dealing legislatively with the question of the exclusion of the Chinese laborers, in lieu of further attempts to adjust it by international agreement" (Foreign Relations for 1888, Vol. I., pp. 356-9). The Chinese Government protested continuously from 1882 on against various provisions of these statutes as violations of the subsisting treaty, the protests becoming stronger as the violations became more pronounced (Foreign Relations). That these last-named Acts were in violation of the Treaty of 1880 was conceded by the Courts (Chae Chan Ping vs. U. S., 130 U. S., 581; Fong Yue Ting vs. U. S., 149 U S., 698). In 1894 an international adjustment of these questions was at length effected, the draft Treaty of 1888, with the addition of an article as to registration, and some slight changes in Articles other than the important Article III here involved, being ratified, and prior statutes were thereby modified and the law meliorated. From the very nature of the thing, therefore, we must expect, even *a priori*, to find in the Treaty of 1894 a substitute by international arrangement for the statutory enactments that China had protested against. China's wishes, interests and dignity were now consulted once more, and a measure satisfactory to her, framed.

The new Treaty, as appears upon inspection, made pronounced changes in the law—all by im-

plication-- because of the reasons just considered. Some of these repeals by implication have been specifically recognized by the Government's conduct ever since, based on opinions of Attorneys General and Treasury officers; others have not. Curiously enough, the provisions of this Treaty had not been the subject of judicial construction until this case arose, with the incidental exception referred to, not here relevant.

(1) Changes in the law made by the Treaty of 1894. An examination of the Treaty of 1894 shows that it was designed to cover the whole ground, and to serve as a substitute for prior statutes and treaties on the same subject, not therein specifically continued, and numerous changes in existing law were made by it, all by implication. In fact, the editor of Vol. 2, Sup. Rev. S., (p. 155), adds a note stating that the treaty "is here inserted because it makes important modifications of the existing statutes on this subject." The recitals of the treaty (28 Stat., 1210, 2 Sup. R. S., p. 155) include references to the Treaty of 1880, and the desire of both governments "to co-operate in prohibiting such emigration" of Chinese *laborers*, the prior statutes which China had protested against being studiously ignored, and the matter being carried back to the last joint regulation, the Treaty of 1880. Article I of the treaty prohibits the immigration, except under conditions specified in the treaty, of Chinese laborers only. Article II authorizes the return, under prescribed safeguards, of Chinese laborers to the United States who have been registered, and have a wife,

child or parent in the United States, or property, or debts, of the value of $1,000 there. In this respect, the treaty concededly repeals by implication the Act of Oct. 1, 1888, as well as Sections 3, 4 and 5 of the Acts of 1882 and 1884. Argument to prove this is unnecessary, for a mere comparison of the two so shows, as does the practice of the Government ever since, in admitting such returning laborers under the regulations thereunder prescribed by the Treasury Department (see Regulations, 2 Sup. R. S., pp. 157-8, note).

The next provision (Article III) deals with the admission of the privileged classes, and with transit of laborers across the country; the former is the principal section considered herein, and was treated as modifying the Act of 1884 in an opinion of the Attorney-General quoted *post* (p. 29); the latter part is involved in cases now before this Court. The Treaty changes the law as to privileged classes in the following respects: (*a*) The new certificate may or must emanate from another source than under Section 6 of the Act of 1884, as the Government concedes (21 Opinions, Attorneys General, 347); (*b*) It need not contain all the facts prescribed by Section 6, and the continuance of the requirement of the certificate "of that act" had been expressly omitted from the draft; (*c*) It is not made mandatory, the word "*may*" having been substituted for "shall" produce a certificate "as required in said section;" (*d*) The repealing effect upon the procedure provision of the Act of 1884, which provided the penalty of deportation for admission without the cer-

tificate of that act, resulting from the change in the certificate and phraseology, is a necessary conclusion from these premises.

Article IV of the treaty reiterates in terms the provisions of the earlier treaty of 1880 for the protection of Chinese and slightly enlarges them, again showing the necessity the drafters of the treaty had in mind of re-enacting even then existing consistent provisions, if they are to be continued. Article V will presently be more fully considered; by it China consents to the enforcement of the Acts of 1892 and 1893, requiring all Chinese laborers within the United States at those dates to register, and the United States consents to similar Chinese laws for registration of American laborers in China, and the United States agrees to furnish the names of all other citizens of the United States in China. Article VI provides that the treaty shall remain in force for ten years, and for a further term of ten years thereafter, unless terminated by notice given more than six months before expiration of the first ten years. In point of time, also, the statutes are thus modified, for the treaty provisions continue for ten years from December, 1894, while the statutes expire by their own express limitation (leaving aside effect of the treaty) ten years from May 5th, 1892 (Sec. 1, Act 1892, Sup. R. S., p. 13).

It is thus obvious that this treaty covers the whole subject of Chinese immigration, designedly makes most radical changes in the law, all by im-

plication, and is and was intended to be, a substitute for the prior laws and treaties, which it repealed by implication.

Henrietta Co. vs. Gardner, 173 U. S., 123, 128.

U. S. vs. Rider, 163 U. S., 132.

U. S. vs. Hewecker, 164 U. S., 46.

U. S. vs. Tynen, 11 Wall, 88.

District of Columbia vs. Hutton, 143 U. S., 18.

The Paquete Habana 175 U. S. 677, 685.

> "It is a well settled rule in the construction of statutes, often affirmed and applied by this Court, that even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will act as a repeal of that act," said Mr. Justice Gray for this Court in the last cited case.

"The amending act is more than a revision of the provisions of the Statute of 1887, it is a substitute for them" (Henrietta Co. vs. Gardner, *supra*).

Nor is the absence of express repealing words, relating to the prior statutes, at all strange. A treaty with a foreign country is not the place where one would even expect to find specifically noted, changes made by it in the municipal law of one of the contracting parties.

This principle of law has peculiar force where the inquiry is whether an international agreement

is designed to serve as a substitute for a prior municipal law of one of the contracting parties, which the other had deemed objectionable. Such other cannot be regarded as acquiescing in the continuance of the very municipal enactment it had objected to. Compare the language of the Court in Geofroy vs. Riggs, 133 U. S., 258, 271, quoted *post*.

The opinion of this Court, in the recent case of

Tucker vs. Alexandroff (Jan. 6, 1902), 183 U. S., 424.

Mr. Justice Brown writing, seems here clearly in point. The question under consideration was whether the express terms of a treaty with Russia as to surrender of deserting seamen superseded oral prior obligations that might have existed, apart from treaty, as to surrender of such seamen. On a point on which there was no dissent on the part of the minority, Mr. Justice Brown said for this Court:

> "The treaty with Russia having contained a convention upon this subject, that convention must alone be looked to in determining the rights of the Russian authorities to the reclamation of the relator. Where the signatory powers have themselves fixed the terms upon which deserting seamen shall be surrendered, we have no right to enlarge these powers upon the principles of comity so as to embrace cases not contemplated by the treaty. Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter (*Ex parte* McArdle, 7 Wall, 506; Endlich Int. Stats. Secs. 397, 400). As observed by Lord Denham in Aspdin vs.

Austin (5 Q. B., 671, 684), 'where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.' The rule is curtly stated in the familiar legal maxim, *expressio unius est exclusio alterius*. In several recent cases in this court, we have held that, where a statute gives a certain remedy for usurious interest paid, that remedy is exclusive, though in the absence of such a remedy, the defence might be made by way of set-off or credit upon the original demand. * * *"

"We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers, and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. (Taylor on Intern. Law, Sec. 383). As treaties are solemn engagements, entered into between independent nations for the common advancement of their interests, and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit, which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries (Vol. 1, p. 174):

" 'Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the

same rules of construction and course of reasoning which we apply to the interpretation of private contracts.' "

In Leavenworth R. Co. vs. U. S., 92 U. S., 733, this Court said:

"But treaties, like statutes, must rest on the words used; 'nothing adding thereto, nothing diminishing.'

In Rex vs. Barrell, 12 Ad. & Ell., 468, Patteson, Justice, said:

'I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty. And the Courts have always treated the subject the same way when asked to supply words in order to give a statute a particular meaning which it would not bear without them.' "

(2). As much weight is given by the government herein to the provisions of Article V of the treaty, that provision will receive more consideration on our part. The section deals with the registration of Chinese and American subjects, respectively, and is a distinct and severable element, and in fact is the only provision as to which the treaty of 1894 differs materially from the treaty signed in 1888, which had no such clause. This in itself indicates its independent and severable character. In fact, until 1892, such registration provisions were unprecedented, and the right to thus deal with aliens already lawfully here, and expel them for non-registering, was doubtful, until determined by this Court by a closely divided vote in the Fong Yue Ting case in 149 U. S. The

provision first appears on our statute books as Sec. 6 of the Act of 1892 (2 Sup. R. S., 13, amended in 1893; 2 Sup. R. S., p. 153). Until then, our statutes and treaties dealt only with unlawful entries into the United States, and with being and remaining there, because of an unlawful entry. The present cases are all cases of alleged unlawful entry, and the Commissioner's jurisdiction is thus limited to that issue: (*a*) by the language of the warrant and complaint (fol. 23); (*b*) by the circumstance that jurisdiction *over non registration cases* is limited to U. S. Judges by the express terms of Section 6 of the Acts of 1892 and 1893, and it has accordingly been held that only Federal Judges and not Commissioners have jurisdiction in such cases (Fong Yue Ting vs. U. S., 149 U. S., at 726), decision without opinion, by Lacombe, J., in March, 1898, in the case of U. S. vs. Sing Kin San, on which occasion a California decision to the contrary was disregarded, and Treasury rulings, Feb. 27th, 1899, and April 14th, 1899, also holding that Commissioners have no such jurisdiction (also Todd vs. U. S., 158 U. S., 278, Rice vs. Ames, 180 U. S., 371, acc.) and (*c*) because the registration provisions apply only to Chinese laborers, who were such within the United States in 1892 and 1893, and petitioner Lee Yen Tai concededly entered the United States for the first time just before his arrest in 1900 (U. S vs. Sing Lee, 71 Fed. Rep., 680–681; U. S. vs. Mark Ying, 76 F. R., 450; Treasury Decision No. 16,636, and Article V of the Treaty of 1894). This matter of registration and deportation for non-compliance was thus a

clear and distinct severable element of the Chinese Exclusion Laws (Fong Yue Ting vs. U. S., 149 U. S., at 725–726) and it was this registration procedure which was specifically recognized in Article V of the Treaty, which reads:

> "The Government of the United States having by an Act of the Congress, approved May 5th, 1892, as amended by an Act approved November 3d, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first named Act to be registered as in said Acts provided, with a view of affording them better protection; the Chinese Government will not object to the enforcement of such acts, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled and unskilled (not merchants, as defined by said Act of Congress), citizens of the United States in China, whether residing within or without the treaty ports."

To the Government's contention that this is a recognition and continuance of the provisions for deportation for unlawful entry, we answer:

(*a*) The provisions China consents to are expressly described as merely those requiring Chinese laborers within the United States to register, and the whole article deals merely with registration, entry having been covered by preceding and previously drafted provisions.

(*b*) The provisions authorizing China to prescribe and enforce "similar laws or regulations for the registration" of American laborers, clearly indicate

the limits of the preceding phrase, and will scarcely be construed as American authorization of such Exclusion Laws on the part of China, as applied to American citizens.

(*c*) The treaty negotiations (considered *post*) show affirmatively that judicial proceedings for deportation for alleged unlawful entry were not to continue further, and this view is reinforced by the change of language of Article III, the certificate section, and its optional, as distinguished from its former mandatory, character.

(*d*) The language of Article V itself, in declaring that the provisions under consideration were continued "with a view of affording them ('Chinese laborers lawfully within the limits of the United States before the passage of the Act' of 1892), better protection" obviously can relate to registration provisions only, which have a relation to protecting Chinese persons, by advising the government of the names, residence and status of such persons in the United States, and can have no reference to proceedings to deport Chinese persons (laborers or *non-laborers*), and placing them *beyond* the protection of the United States. Of course all laws must be sensibly and reasonably construed (Lau Ow Bew vs. U. S., 144 U. S., 47; U. S. vs. Mrs. Gue Lim, 176 U. S., 459), and such a clause must be construed as having the meaning it bears upon its face, with regard to registration alone, and not designed to dishonestly mislead and deceive the co-contracting party.

> "In the solemn treaties between nations it can never be presumed that either state intends to provide the means of perpetrating or protecting frauds; but all the provisions are to be construed as intended, to be applied to *bona fide* transactions"

said this Court in U. S. vs. Schooner Amistad, 15 Peters, 518, 595.

Similarly this Court said, in New York Indians vs. U. S., 170 U. S., 1, 23:

> "There is something, too, which shocks the conscience, in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power, or an Indian tribe, a material portion of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it."

(e) Moreover, this contention of the Government obviously proves too much, for if the prior Acts in their entirety could be deemed to be thereby incorporated into the treaty by this language, they would render the treaty absurdly contradictory, by making it re-enact provisions inconsistent with itself, and modified by this treaty, as already pointed out in considering the conceded changes in the law made by the treaty.

(*f*) It is, however, obvious that the treaty continues in force, as it says, not the procedure provisions for unlawful entry, of the Acts of 1882 and 1884, but only the provisions of the Acts of

1892 as amended in 1893, that, in the language of the treaty "required all Chinese laborers lawfully within the limits of the United States before the passage of the first named Act to be registered as in said Acts provided." This, as this Court had held in the Fong Yue Ting case, was a severable element of the Act of 1892, being the portion of that act dealing, not with the class of persons "not lawfully entitled to be or remain in the United States," under the laws as they stood when this Act of 1892 was passed, but with the class "entitled to remain in the United States," and required by Sections 6 and 7 of that act to register (Fong Yue Ting case, at pp. 725–726).

(*g*) Hence, even in terms, the Treaty does not refer to the Acts of 1882, 1884 and October 1, 1888 (continued in force by the Act of 1892), but not part of that act, nor to Sections 2 to 4 of the Act of 1892, which provisions the Supreme Court in the last cited case (p. 725) has held only "concern Chinese 'not lawfully entitled to be or remain in the United States'" under the laws on the books on May 5th, 1892, but only to Sections 6 and 7, "the manifest objects" of which "are to provide a system of registration and identification of such Chinese laborers" (725), and similar provisions on China's part concerning Americans in China for their protection were authorized by this article of the Treaty.

(3) The Government's contention that the 5th Article of the Treaty has continued in force all the prior deportation acts, including Section 12 of the

Act of 1884, has brought it to the logical deduction, stated in its brief in the Circuit Court of Appeals, that "it is difficult to detect the least particle of conflict between the treaty of 1894 and the former Chinese Exclusion Acts, and assuredly there is nowhere a 'positive repugnancy,' nor can it be said that 'harmony is impossible.' " It is not surprising that this ignores the opinions of the Attorney-General and the everyday practice of the Government since December, 1894, to the effect that the non-return of laborers' provisions of the statute and the certificate provision for exempt classes are unquestionably modified, because inconsistent with the treaty; we have already seen that a mere comparison of the treaty with the statute discloses these inconsistencies.

The Government's contention, therefore, that Article V of the Treaty has continued all the provisions of the prior statutes in force, is obviously untenable.

(4) The principle "*expressio unius est exclusio alterius*" applies, and establishes the repeal by the treaty of the procedure provision (Section 12 of the Acts of 1882 and 1884). The peculiar applicability of this principle to treaties is recognized in the case of

Tucker vs. Alexandroff, *supra* (p. 12).

See also

U. S. vs. Rauscher, 119 U. S., 407, 420.

The provisions of former statutes and treaties, intended to be kept in force by the treaty, of those relating to Chinese immigration, are expressly

specified. Thus, see Article IV continuing in force Article III of the Treaty of 1880, Article V continuing in force the registration provisions and their enforcement, and Article III, preserving the right of entry of the classes entitled to enter under prior laws. Section 12 of the Act of 1884 not being continued or referred to in any way, was not intended to be kept alive.

POINT II.

As the Acts of 1882 and 1884 were merely designed, as expressed even in their titles, to carry out the treaty of 1880, the repeal of that treaty by the substitution for it of the treaty of 1894 effected a repeal ipso facto of the Acts of 1882 and 1884 and of their extension, except in as far as expressly continued in terms by the treaty.

The Treaty of 1880 with China (22 Stat., 826) was a consent, on China's part, to subsequent legislation by the United States restricting the immigration of Chinese laborers within definite limits; without it, such acts would have violated the Treaty of 1868 (Fong Yue Ting case at pp. 716-7). The Treaty of 1880 was not self-executing, did not by its terms exclude any Chinese person and required legislation to carry it out (compare 6 Opinions, Attys-General, 296, 750 (Cushing), Foster vs. Neilson, 2 Peters, 318; Christian vs. Eckhart, 2 Howard, 344, 375; Fong Yue Ting Case, 149 U. S., p. 720). Pursuant to the Treaty

of 1880 Congress passed the Act of 1882, entitled "An Act to execute certain treaty stipulations relating to Chinese" (22 Stat., 58, 1 Sup. R. S., p. 342), and amended this act in 1884 (1 Sup R. S., p. 458); the terms of its duration being ten years from 1882, and it was extended for ten years more in 1892 (2 Sup. R. S., 1–3). This Act of 1882 was purely auxiliary to the treaty, being designed to carry out a treaty not self-executing; accordingly, the Courts repeatedly held that it was subordinate to the treaty, and, except in as far as the intent of Congress to violate the treaty might be unmistakable, these Acts were to be construed to accord with its provisions, and so as in fact "to execute certain treaty stipulations relating to Chinese."

The title and recitals of such a statute, designed to execute a treaty which was not self-executing, are an essential and important part of the statute, and not merely nominal (Cases, *supra*, and Price vs. Forrest, 173 U. S., 410, 427; U. S. vs. Fisher, 2 Cranch., 358; U. S. vs. Palmer, 3 Wheaton, 610, 631), and they have been so regarded in this instance and effect has been given to this circumstance with respect to this very treaty (Chew Heong vs. U. S., 112 U. S., 536, 544, 549, 560; Lau Ow Bew vs. U. S., 144 U. S., 47, 62; U. S. vs. Mrs. Gue Lim, 176 U. S., 459, 462, 465). In the last cited case, the Court said (p. 462):

> "The Act of 1882, of which that of 1884 was an amendment, was passed, as is stated in its title, 'To execute certain treaty stipulations relating to Chinese,' and therefore we

> must assume that the body of the Act has that purpose." (Also p. 465, where still stronger language is employed).

But the treaty of 1880 was repealed by the treaty of 1894, every paragraph and sentence of the latter being inconsistent with the former, with the single exception of Article III of the former, which was accordingly in terms re-enacted in Article IV. of the latter (La Republique Francaise vs. Schultz, 57 Fed. Rep., 37, 40, Townsend, J.).

The relations of a statute to execute such a treaty, to the treaty itself, and the effect on the statute of the repeal of the treaty, or substitution of a new treaty therefor, are questions which have not often come before the Court. The following authorities throw light upon the subject:

In Queen vs. Wilson, L. R., 3 Q. B. D., 42, 45, Chief Justice Cockburn held:

> "I cannot entertain a shadow of doubt that in accordance with the special provision in the Extradition Act of 1870, by which Her Majesty may make the treaty and the application of the Act subject to any terms and conditions that she may think proper, the Order in Council must be co-extensive with and limited by the treaty, for otherwise our municipal legislature might be at variance with the terms which the two countries arranged between themselves—a proposition absurd upon the very face of it."

The same question is, of course, apt to arise with respect to statutes thus related to other statutes. Accordingly, we find the rule laid down in the American and English Encyclopedia of Law,

volume 23, page 155, article "Statutes" (based upon Bacon's Abridgment Statutes I, 1876 edition, vol. 9, page 223):

> "If a statute which does not itself contain any limitation is to be governed by another, which is temporary merely, the former will also be temporary, and dependent upon the existence of the latter."

In Bacon's Abridgment the authority relied upon for the proposition is *In re* Gallile, 7 Term Reports, 673, where it was held with respect to a statute upon which an action was based which required masters of ships to employ seamen in numbers depending upon the tonnage of the vessel, as disclosed by the vessel's certificate from the Custom House, that the repeal of the statute prescribing such Custom House certificate, effected the repeal of the statute relied upon. The Court said:

> "Then there is no act of Parliament now subsisting, to enable the party to procure the certificate required by the statute 6 and 7 William III., and consequently the 19th Section of that Act was temporary, as indeed were the other adjoining clauses in that Act. If the law regulating the protections is to be governed by another law which was only temporary, and no longer exists, it must also be a temporary law itself."

See also 20 Opinions Attorneys-General, 467.

With the repeal of the Treaty of 1880 in 1894, the statutes to execute it fell *ipso facto*, except in as far as the new treaty expressly in terms con-

tinued them. No judicial procedure for deportation was, in terms or even by implication, continued by the treaty, and hence the commissioner herein was without jurisdiction.

POINT III.

The U. S. Commissioner had no jurisdiction to hear or determine the case, the Procedure Provision (Section 12) of the Act of 1884 having been repealed by the treaty of 1894, which prescribed a different and optional certificate for entry, and the treaty conferred no jurisdiction by means of judicial proceedings for the deportation of persons who unlawfully entered the United States, but left the matter to the action of executive officers charged with the duty of preventing unlawful entry.

Under the Act of 1882 as amended in 1884 (1 Sup. Rev. Statutes, p. 458, Sections 6 and 12), and by the Act of October 1st, 1888 (1 Sup. R. S., p. 625), and the Acts of May 5th, 1892 (2 Sup. R. S., p. 13), and Nov. 3d, 1893 (2 Sup. R. S., p. 153), Chinese persons permitted to enter the United States were required to produce the certificate prescribed by Section 6 of the Act of 1884; the only exceptions to this rule were Chinese diplomatic officers and their households (Sec. 13, Act 1884), and non-laboring Chinese persons returning to the United States *animo revertendi* (Lau Ow Bew vs.

U. S., 144 U. S., 47, and see also pp. 52-3), and the wives and minor children of Chinese persons authorized to enter, which wives and minors have no status of their own, and to whom the certificate provisions were deemed inapplicable (*In re* Tung Yeong, 19 Fed. Rep., 184, 189, and U. S. vs. Mrs. Gue Lim, 176 U. S., 459), and applied by Treasury Department, Synopsis Treasury Decisions No. 23262, September 4th, 1901). Returning merchants were required to furnish certain evidence by means of non-Chinese witnesses by Section 2 of the Act of November 3d, 1893. Of course, citizens of the United States by birth of Chinese extraction are not excluded (U. S vs. Wong Kim Ark, 169 U. S., 649). The return of laborers was absolutely forbidden by the Act of Oct. 1, 1888 (1 Sup., p. 625).

A person in Lee Yen Tai's position, before the Treaty of 1894, could lawfully enter only by producing the certificate prescribed by Section 6 of the Act of 1884, to prove that he was not a laborer.

> "The purpose of the Sixth Section, requiring the certificate, was not to prevent the persons named in the Second Article of the Treaty from coming into the country, but to prevent Chinese laborers from entering under the guise of being one of the classes permitted by the Treaty. It is the coming of Chinese laborers that the Act is aimed against,"

says the Court in U. S. vs. Mrs. Gue Lim, 176 U. S., 459, 467. If he succeeded in entering, whether by stealth or pursuant to the ruling of executive

officers, judicial proceedings for his deportation were authorized by Section 12 of the Act of 1884, which reads (1 Sup. R. S., pp. 460–1):

> "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this Act required of Chinese persons seeking to land from a vessel. Any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United states, after being brought before some Justice, Judge or Commissioner of a Court of the United States, and found to be one not lawfully entitled to be or remain in the United States."

The Act of October 1st, 1888 (which was passed after the Act of September 13, 1888, which latter Act was to go into effect as to all but one of its provisions only upon the ratification of a Treaty with China, which China rejected), expressly adopted this procedure section (Sec. 12 of the Act of 1884), to apply to laborers, returning or originally entering (Sec. 3, Act of October 1, 1888, 1 Sup. R. S., p. 625), so that it is clear that at the time of the hearing of this cause below, Sec. 12 alone, if any, provision of law, conferred jurisdiction on the U. S. Commissioner to hear this cause (*In re* Chow Goo Pooi, 25 Fed. Rep., 77; Sawyer, Sabin & Hoffman, JJ.) *In re* Li Foon, 80 Fed. Rep., 881 (Lacombe, J.). *In re* Li Sing, 86 Fed. Rep., 896 (C. C. A., Shipman, J., writing); affirmed 180 U. S., 486. Hence the Circuit Court of Appeals has certified the question whether that section is still in force.

It should be observed that no reference whatsoever to the Treaty of 1894 was made by counsel in the Li Sing case, in any of the Courts, and the effect of that Treaty upon the acts there construed was never under consideration.

(1) The Treaty of 1894 (28 Stat. at L., p. 1210; 2 Sup. R. S., p. 155), prescribed a new and different certificate to be produced by Chinese applicants, and the penalties for entry without the former certificate were not continued, and fell by their own terms.

(*a*) In the passage above quoted from Sec. 12 of the Act of 1884, it was provided that entry "without the certificate in this act required" was prohibited, and a procedure for deportation by judicial orders for such unlawful entry prescribed. The treaty of 1894 has prescribed a new and different certificate, taking the place of the old one, "this act" (of 1884) no longer prescribes any certificate, and by its own language, the procedure section for entry without a superseded certificate, falls. Article III of this treaty reads as follows:

> "The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a

certificate from their government or the government where they last resided, vised by the diplomatic or consular representative of the United States in the country or port whence they depart."

In considering this provision, the Attorney General in 21 Opinions, 347, ruled in 1896, that Chinese persons who reside at Hong Kong must, under this treaty, produce a certificate from the British authorities there, and not from the Chinese Government, as before. He said:

"While called a convention, the document to which you refer is clearly a treaty within the meaning of the Constitution of the United States. It is, therefore, so far as its provisions are self-executing, a part of the supreme law of the land. It is my opinion that the provisions of the article under consideration are self-executing. It requires a certificate from the Government of the Colony of Hong Kong. It requires nothing more than that. Its requirements would not be satisfied by a certificate from the Government of China.

The Act of July 5th, 1884, Chapter 220, Section 6, requires that certificates in similar cases should be issued by the Chinese Government, 'or of such other foreign government of which, at the time, such Chinese person shall be a subject.' Prior, therefore, to the treaty of 1894, a certificate from the authorities at Hong Kong would have been insufficient in the cases now under consideration, and a certificate from the Chinese Government would have been necessary.

You ask my opinion whether the treaty 'waives or modifies the requirement of the Act of 1894.' As the treaty is subsequent to the statute, and as its provisions are self-executing, I am of the opinion that it does modify the requirements of the statute, so

> that the certificate must now come from Hong Kong and not from China (The Cherokee Tobacco Co., 11 Wall, 616, 621; Whitney vs. Robinson, 124 U. S., 190, 194; 13 Opin., 354)."

A certificate is required of certain persons by the treaty, being the same persons, doubtless, of whom a certificate is required under the act of 1884, Section 6 (U. S. vs. Mrs. Gue Lim, 176 U. S., 459); but the certificate now in question is a different one than before, as pointed out by the Attorney-General. It need no longer be a certificate from the Chinese Government or such other government as the applicant may have been a subject of, but may be from his government or of the government where the applicant last resided. Moreover, the certificates of persons enumerated in that article where vised by the diplomatic officers of the United States need, by the terms of the article, contain nothing more than the permission or statement of right to enter, unlike the former certificate (compare Sec. 6, Act of 1884, 1 Sup. R. S., p. 459). In the language of the Attorney-General, the treaty "requires nothing more than that."

The language of the treaty has its present shape by design, because a reference in a prior draft thereof to the certificate "required by the Act of 1884" was expressly stricken out by consent, as a result of a conference between Secretary Bayard and the Chinese Minister. (See Foreign Relations of the United States, 1888, Vol. 1, pp. 393–4, Article III.)

This change is extremely suggestive, for the word "may" was substituted for the phrase "shall

in accordance with Section 6 of the law of July 5th, 1884, of the Congress of the United States" and, after the words "produce a certificate" the words of the draft "as required in said section" were omitted. The numerous details prescribed by Section 12 of the Act of 1884 to be contained in such certificate, are, therefore, no longer necessary, not being required by this later treaty; its source is different, and the whole certificate was made permissive, not mandatory, and a partial repeal of the earlier statute was thus effected, no matter what, on other points, the proper construction of this article of the new treaty may be.

The section of the law that the government must invoke, to effect the deportation of Chinese persons who have entered the United States, establishes a procedure applicable only where the certificate "required by the Act of 1884 (Sec. 6)" is not produced. By the very terms of Section 12, entry without "the certificate in this act required" is prohibited. These provisions of the Act of 1884 being repealed, there is no longer any certificate required by any such act, and there is no right to proceed under Section 12 of the Act of 1884 for the deportation of such Chinese persons.

(*b*) The diplomatic correspondence immediately antedating the treaty shows this further, as Chinese persons objected to judicial proceedings to pass upon their rights during an unlimited period after they had entered; these objections were communicated to the American Secretary of State by the Chinese Minister, were specifically acquiesced in

by our Government, and the references to the prior certificate and its mandatory provision eliminated, thus carrying with it this procedure provision (Foreign Relations of the U. S., 1888, Vol. I, pp. 368–370, propositions 7 and 13, 371–3, 393, 398).

It should be remembered that this treaty in the form in which it was promulgated in 1894 was negotiated and signed already in 1888, except that Article V was subsequently substituted for the original Article V, as to registration of Chinese and American subjects, and a few verbal changes were made in certain articles; Article III was left absolutely unchanged. China rejected the treaty in 1888, after subsequent amendment by our Senate (p. 398), but finally adopted it in its original shape in 1894, with the inclusion of the new Article V, and it was then promulgated.

The Chinese Minister on March 18th, 1887, submitted his draft of proposed amendments, with reasons therefor, to the Secretary of State, stating (Foreign Relations, 1888, I, 368–370):

> "Chinese merchants who belong to the exempt class mentioned in the treaty, on their landing at the port of San Francisco, have been often subjected to inconveniences and troubles by being compelled to appear in Court, through the acts of the local authorities at that port, in investigating and discriminating the cases of returning Chinese laborers thereto in past years. Hereafter they should be permitted to land upon the presentation of their certificate or production of evidence or bond of security, without the necessity of going into Court for examination."

On April 11, 1887, Secretary Bayard acquiesced in this proposition (pp. 371-3), and as a result of a personal conference between him and the Chinese Minister, held in March, 1888 (p. 393), the changes in the draft above referred to, were made, eliminating judicial proceedings after entry, and the language of the present Article III verbatim was agreed upon.

The scheme adopted to reach this result was to make the certificate optional, not mandatory, and to supersede the requirement of the Act of 1884, and with it the procedure and penalty thereby established for entry without such certificate.

Reference is proper to these treaty negotiations, as evidence of the history of the times, the attending circumstances, and the evils aimed at and the purposes of the drafters of the treaty (U. S. vs. Ah Fawn, 57 F. R., 591; U. S. vs. Wong Kim Ark, 169 U. S., 649, 697–9; Dunlap vs. U. S., 173 U. S., 65, 75). Such rules apply to treaties (U. S. vs. Payne, 8 Fed. Rep., 892; U. S. vs. Perchemann, 7 Peters, 51; U. S. vs. Ah Fawn, *supra*).

(2) The treaty of 1894, Article III, contains a directory provision for a certificate, but does not provide any penalty or procedure for deporting persons who have entered without it.

It is obvious that this provision is directed to the administrative officers of the Government, the various Treasury and Immigration officers charged with the duty of enforcing these laws and prohibiting the entry of Chinese persons into the country.

This is in line with the simultaneous and subsequent action of Congress, investing them with exclusive jurisdiction over such matters, and divesting the Courts thereof, in cases of applications by aliens to enter, even to review their actions (Act of 1894, and later acts, considered in Lem Moon Sing vs. U. S., 158 U. S., 538; Williams vs. U. S., 168 U. S., 382, 387–8; U. S. vs. Jacobus (C. C. A., Wallace, J., writing, still unreported, quoted *post* (p. 46).

The two Governments were willing to rely upon this administrative system for enforcing the laws, and did not chose to provide for any procedure involving imprisonment and other hardships, with respect to persons who have entered the country. A prior procedure section, like Sec. 12, for enforcing a provision of a statute, does not apply, to carry out a subsequent, different, treaty provision. In this aspect of the case, the argument for the government is much weaker than the one made by it under the Custom Laws in Bartram vs. U. S., 77 Fed. Rep., 604, where it was held by Judge Wheeler that where regulations were prescribed by the Treasury Department under one law, and subsequently another was passed, using similar language, but requiring regulations to be promulgated to enforce it, the former regulations are inapplicable.

As said by Judge Wheeler in that case:

> "Proof under this paragraph of the act of 1894 was to be made under general regulations 'to be prescribed by the Secretary of the Treasury' in the future, and prior regulations

would not apply. None had been made under this paragraph at the time of these importations, and therefore none applicable were then in force."

See accordingly

In re Kearns, 64 Fed. Rep., 481.
In re Kinney, 102 F. R., 468,

involving oleomargerine and the general internal revenue laws. These rulings are in accord with decisions of this Court in which procedure and penalty provisions of one act were held inapplicable to subsequent statutes, in the absence of language expressly adopting them.

U. S. vs. Paul, 6 Peters, 141.
Farmers' Bank, vs. Dearing, 91 U. S , 29, 35.
Barret vs. Munsie Bank, 98 U. S., 555.
McBroom vs. Scottish Co., 153 U. S., 318, 325.
U. S. vs. Gillmore, 8 Wall, 330.

The applicability of this principle to treaties was just declared in Tucker vs. Alexandroff, *supra*.

Nor is it reasonable to suppose that when the two nations entered into a national compact, concedely changing the municipal law of the one in various matters, they intended to keep in force, as part of this new international compact, provisions of the municipal law of the one country, in no way referred to in the compact. Whatever may be the rule of construction as to continuance of prior procedure

provisions as to statutes, no such presumption can reasonably be resorted to as to treaties between sovereign nations.

Closely in point as to this discussion is the decision of the Supreme Court in the case of

The Amiable Isabella, 6 Wheaton, 1,

where the question was presented whether any effect could be given to the treaty with Spain, referring to a form of passport as annexed to the treaty, when, in fact, the form was omitted. This Court, Judge Story writing, held that this provision must be treated as absolutely nugatory and unenforcible. He said:

> "Can this Court annex a form to the treaty? Can it supply the deficiency of the treaty, and give effect to it in the same manner as if no form were referred to." * * * We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualifications or integral part of any stipulation, upon any notion of equity or general convenience, or a substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the model parts of the treaty, equally give the rule to judicial construction. The same powers which have contracted are alone competent to change or dispense with any formality."

(3) The certificate is no longer mandatory or exclusive.

An examination of the Treaty of 1894 shows clearly that only the immigration of Chinese la-

borers is prohibited. Article I so provides. Article III, which enumerates some (though not all) of the classes coming to the United States privileged to enter, is not mandatory, even in form, as to the production of a certificate by non-laborers. It merely provides that "to entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate." The suggestive change in the draft of the treaty has already been referred to, pursuant to which the words "shall in accordance with Section 6 of the law of July 5, 1884, * * * produce a certificate as required in said section" were replaced by the permissive language under consideration. In the light of this circumstance, the contention made by the Government in the Gue Lim case (176 U. S., 459) brief, that "may" here means "must," is obviously untenable. But even without reference to the treaty negotiations, the same conclusion should be reached. While it is true that in our statutes, the technical term "may" sometimes should be construed as "must," this Court has determined that principle to be inapplicable to treaties.

As held by the Court in Geofroy vs. Riggs, 133 U. S., 258, 271:

> "It is a general principle of construction with respect to treaties that they shall be liberally construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local

> law, unless such restricted sense is clearly intended. And it has been held by this Court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred."

In Lau Ow Bew vs. U. S., 144 U. S., 47, 62, the Court said:

> "There can be no doubt, as was said by Mr. Justice Harlan, speaking for the Court in Chew Heong vs. U. S., 112 U. S , 536, 549, that since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions should be rejected which imputed to Congress an intention to disregard the plighted faith of the Government, and consequently the Court ought, if possible, to adopt the construction which recognized and saved rights secured by the treaty."

This principle requires, accordingly, a holding that "may" in Article III, of this treaty is permissive and not mandatory (U. S. vs. Thoman, 156 U. S., 359; Minor vs. Mechanics Bank, 1 Peters, 46, 63-4; The Mary N. Hogan, 17 Fed. Rep., 814; approved in the Three Friends, 166 U. S., 1, 67) in accordance with the treaty negotiations; that, accordingly, the mandatory provisions for a certificate under Sections 6 and 12 of the Act of 1884 have been superseded, and such certificates have become optional, and that hence persons can no longer be excluded as laborers, because not shown by the statutory certificate to be non-laborers, a view greatly strengthened by the fact that the treaty of 1894 (Article 1) excludes only "Chinese laborers," while Article III, is directory only, not

mandatory, and contains no words of exclusion, and the purpose of the treaty is recited to be the exclusion of laborers only.

The language of this Court in U. S. vs. Jung Ah Lung, 124 U. S., 621, showing that Section 4 of the Act of 1882 prescribed a certificate which was not mandatory or exclusive, directly applies to the similar language of this treaty, Article III. This Court said:

> "The section (Sec. 4) then says: 'The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States, upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re enter.' It does not say that such certificate shall be the only evidence permissible to establish the right of re-entry. It merely says that it shall be given for the purpose of properly identifying the laborer, and shall be proper evidence of his right to go from and come to the United States, and shall entitle him to return to and re-enter the United States, upon producing and delivering it to the collector of the district at which he shall seek to re-enter. It does not say that the Chinese laborer returning by a vessel shall not be permitted to enter the United States without producing the certificate. In this respect there is a marked difference between Section 4 and Section 12 of the same Act, in regard to a Chinese person entering the United States by land. Section 12 provides that no Chinese person shall be permitted to enter the United States by land without producing the certificate mentioned in Section 4 of the Act. This difference of language is very marked."

Hence, in the treaty in question, the language of Section 12 was discarded by the drafters of the

treaty with this decision before them; and language like that just held to be permissive and not mandatory, was employed instead, by express alteration of the original draft. This Jung Ah Lung case was decided on February 13th, 1888, just a few weeks before the changes in the draft of Arficle III of the Treaty were made, in March, 1888 (Foreign Relations 1888, I. p. 393.

Article III was not altered or modified, by being made exclusive, either in 1888 or 1894.

It is also important to note that the same difference between permissive and mandatory language, noted in this decision between Sections 4 and 12 of the Act of 1882, is found in the Treaty of 1894 between Articles II (last sentence) and III. Unlike Article III, the second article as to returning laborers, provides: "And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required." This was a Senate amendment to the draft in March, 1888, adopted in consequence of this same decision.

Moreover, the treaty marks an entire change of policy with respect to entry by land of Chinese persons. The Acts of 1882 and 1884 (Section 12), provided that "no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this Act required of Chinese persons seeking to land from a vessel." The certificate required of Chinese persons "seeking to land from a vessel" herein referred to, is the one, as expressly

held by this Court in the above entitled case of Jung Ah Lung, "mentioned in Section 4 of the Act," the certificate exacted of returning laborers. The result is that under the acts of 1882 and 1884, Chinese non-laborers were not permitted to enter by land at all. Of course, returning non-laborers and their children (Lau Ow Bew vs. U. S., 144 U. S., 47; U. S. vs. Mrs. Gue Lim, 176 U. S., 459) and Chinese born here, were not thus dealt with. In the treaty, a new policy was adopted, reference to the certificates of the Acts of 1882 and 1884 were expressly elimina'ed, and non-laborers permitted to enter anywhere, by land or by sea.

That the certificate was not designed to be mandatory under the treaty is further apparent from the Chinese Minister's proposition, acquiesced in by our Government and quoted *supra* (p. 32) as leading up to the change in the draft of the treaty, that hereafter Chinese merchants should be admitted upon presentation either "of their certificates or production of evidence or bond of security."

Nothing inconsistent with this was held in the Gue Lim case, 176 U. S., 459, relied on by the Government. In that case the question was presented whether the wives and children of Chinese merchants domiciled in the United States were required to produce a certificate to enter. The Court below held that they were not, and on the Government's appeal to this Court, there was no appearance for appellees. The Government contended in its brief that the words "may" in this Article III means "must," and that, whether defendants, under the Act of 1884, were or were not

required to produce a certificate, the new treaty provision made certificates mandatory. But this Court, in the light of the language of Article III, as to "the right at present enjoyed by Chinese subjects," said:

> "It is contended on the part of counsel for the Government that by the subsequent treaty of March, 1894, 28 Stat., 1210, the two Governments have agreed that the requirements of a certificate as provided for in the Sixth Section of the Act of Congress shall apply to all permitted Chinese subjects, who must, without exception, produce such certificates. Article Two of the Treaty of 1880 and Article Three of the Treaty of 1894 are set out in margin.
>
> "We do not think the treaty of 1894 alters the result flowing from the treaty of 1880 and the Act of 1884. The question is whether under the Act of 1884, construed in connection with the Treaty of 1880, the wife of a Chinese merchant, domiciled in this country, may enter the United States without a certificate, because she is the wife of such merchant.
>
> "Although the third article of the treaty of 1894 does speak of certificates for Chinese subjects therein described, who already enjoy the right to enter the country, the question recurs whether the certificate of the husband who himself enjoys the right is not enough for the wife, the fact being proved or admitted that she is such wife. Possibly the result of the treaty of 1894 may be held to be, instead of simply prohibiting the entrance of Chinese laborers, to restrict the right of entry to those classes who are specially named in the third article of the treaty. But the question would still remain whether the wives of the members of the classes privileged to enter, were not entitled themselves to enter by reason of the right of the husband and without the certificate mentioned in the Act of 1884."

(4) In any event, even if there was no such intention on the part of Congress, it is not competent for the Courts to supply supposed defect and gaps in legislation, particularly not where such proposed additional legislation would be such a gross violation of individual liberty and personal rights. The language of the Court in the recent case of U.S. vs. Goldenberg, 168 U. S., 95, is here applicable:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he uses. * * * The Courts have no function of legislation, and simply seek to ascertain the will of the legislature. * * * No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify judicial addition to the language of the statute * * * Under these circumstances all that can be determined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the action of the collector, and hence there is no warrant for enforcing any such condition."

See acc. The Amiable Isabella, quoted *supra* (p. 36).

This argument is strengthened by consideration of the fact that Congress, immediately after this treaty was signed in 1888, passed the Act of September 13th, 1888, to carry out its provisions, including a procedure provision, thus clearly recognizing that neither the treaty itself nor earlier provisions were regarded as still in force. But China rejected the treaty, upon whose ratification the act was dependent (Li Sing vs. U. S., 180 U. S., 486) and the Act of October 1st, 1888, was passed instead. Later, when the treaty (with the fifth ar-

ticle added) after its signature on March 17th, 1894, was ratified in 1894, Congress enacted no such procedure provisions, but passed the Act of 1894 (28 Stat. at L., p. 390), making the action of treasury officials excluding aliens final. Hence there is a gap in existing statutes as to procedure for deportation, designed or accidental. Design may be found, apart from the Treaty Negotiations, also from the language of Article IV of the Treaty of 1894, affording Chinese persons for the protection of their person and property, all the rights of the most favored nation except the right to become United States citizens by naturalization. This may well have been designed to put an end to the barbarous and inhumane deportation proceedings China had complained of, in which Chinese persons were being arrested on complaints not under oath, charged with having entered the United States unlawfully, though they may never have been outside of the country, or may many years before have been admitted by the customs officials, and required to meet the burden of proof by establishing "by affirmative evidence" to the "satisfaction" of some bigoted petty magistrate, their right to remain here.

POINT IV.

The subsequent legislation of Congress does not evince any intent to continue judicial proceedings for unlawful entry.

It is contended by the Government that subsequent statutes, enacted since the Treaty of 1894

was proclaimed, evince a legislative intention to continue the deportation procedure for unlawful entry. In passing, we may observe that such subsequent legislative intent, even if it could be found, could scarcely be regarded as binding upon or an admission by China, a co-ordinate party to the treaty. Moreover, it is obvious that the Act of March 3d, 1901, relied on by the Government, has nothing to do with this case, because passed long after this case was decided by Judge Brown, and in large measure to meet this very contention. The other statutes are all irrelevant to this discussion, being mere appropriations for the exclusion and deportation of Chinese persons.

It is not contended by appellee that the various statutes passed at the time of the ratification of the treaty and since, do not furnish ample authority for the exclusion upon attempted entry of Chinese laborers by executive action. Moreover, appropriations were proper, and may possibly be authorized by these statutes, for the deportation, even by judicial procedure, of Chinese laborers convicted of not registering, pursuant to Section 6 of the Acts of 1892 and 1893 and Article V of the Treaty of 1894.

In fact, however, further consideration of these appropriation act provisions becomes unnecessary, because the Courts have decided expressly that these provisions are inapplicable to judicial proceedings. The precise point was raised in the case of Jacobus vs. U. S., decided by the Circuit Court of Appeals on July 16th, 1899, but not

yet reported. In that case the Government contended that these provisions (as found on the statute books before the treaty of 1894, but identical with those the Government invokes) applied to deportations under judicial proceedings, and limited the compensation of the U. S. Marshal for his services in executing these warrants, to "actual expense of conveyance of Chinese persons to the frontier or seaboard for deportation," pursuant to the express terms of the statutes, which are sections, however, in appropriation acts under the heading "Miscellaneous Objects under the Treasury Department." The Court (Wallace, J., writing) overruled this contention, however, and held:

> "In executing warrants for deportation of Chinese persons, the marshals of the United States are not in any sense agents or subordinates of the Treasury Department; they are enforcing judicial process as the officers of the Court. We think that their compensation is to be paid out of the regular judicial appropriations. As Congress had entrusted the general supervision of the Chinese Exclusion Laws to the Secretary of the Treasury, entailing expenses upon that department, it was proper and necessary that the expenses of that department should be provided for by an appropriation. In our opinion the appropriation act in question is merely intended to provide for the expenses of the Treasury Department, and the actual expense of conveyance therein mentioned refers to the expenses which may be incurred by that department, and can have no application to the expenses which are incurred by other departments of the government."

The government has acquiesced in this decision, withdrew its appeal therefrom, and the

ruling is directly in line with a decision of the Supreme Court, construing the same provisions in collateral proceedings (Williams vs. U. S., 168 U. S., 382, 387–8).

As regards the Act of March 3d, 1901, authorizing United States Attorneys to designate the United States Commissioner to hear these causes, including cases of unlawful entry (31 Statutes at Large, p. 1093), it has already been observed that this Act was passed long after the Lee Yen Tai proceedings arose, so this statute is wholly irrelevant to the present discussion, and the question need not be here further considered whether this statute is not inconsistent with the Constitution, because vesting the appointment of the Commissioner to hear each particular cause in officers other than those authorized by the organic law (Article II., Sec. 2, Subd. 2), and contrary to due process of law and the separation of governmental powers, because enabling the prosecuting officers to improperly influence or coerce Commissioners, by withholding such causes and compensation from Commissioners who do not do the bidding of the particular executive officers.

POINT V.

The Government's claim that appellee's contention would deprive the Chinese Exclusion Laws of all force is erroneous as well as irrelevant.

Under the construction herein contended for, the Non-Registration provisions would stand, and

exclusion by executive action for attempted unlawful entry would also continue. It requires no argument to show that the great majority of Chinese cases are now thus dealt with, and that this system of executive action has been found quite adequate as a method of enforcing the Immigration Laws, other than the Chinese. In fact Article IV of the Treaty, giving Chinese all the rights of the most favored nation, except the right to become citizens by naturalization, may itself be invoked as sufficient authority for terminating this barbarous Chinese Exclusion system, which is wholly *sui generis* and not in vogue as to any other nation, more or less "favored." (See cases in which effect has been given to this provision of the treaty, *In re* Quong Woo, 13 Fed. Rep., 229, 233, Field, J.; *In re* Ah Chong, 2 Fed. Rep. 733, 737–9; *In re* Parrot, 1 Fed. Rep., 481, 485, 498; Yick Wo vs. Hopkins, 118 U. S., 356, 368, 369; U. S. vs. Wong Kim Ark, 169 U. S., 649, 702. See also Storti vs. Mass., 183 U. S., 138).

The contention here advanced does not strike at the exclusion of Chinese laborers by executive action. It is merely a contention that the barbarous deportation procedure by judicial action has been superesded, under which no Chinese persons' rights are safe from attack in this country from the charge of unlawful entry, no matter how long he may have been here before his arrest within this country, with resulting imprisonment, reversal of burden of proof, denial of jury trial and oppressive hearings before bigoted petty magistrates.

Moreover, further safeguards may be found in the criminal provisions of the Exclusion Laws against bringing Chinese persons into the United States unlawfully.

In addition, it may be observed that, if the Act of March 3d. 1901. be valid, it may authorize deportation by judicial proceedings in cases thereafter instituted, though its authorization as a procedure section is even far more meagre and vague than Section 12 of the Act of 1882 and 1884, which was severely criticized for this reason (*In re* Chow Goo Pooi, 25 Fed. Rep., 77, Sawyer, Hoffman and Sabin, JJ.).

POINT VI.

The question certified should be answered in the affirmative.

Respectfully submitted,

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